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# Decision

**Matter of:** ThunderCat Technology, LLC

**File:** B-421299

**Date:** March 6, 2023

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Paul F. Khoury, Esq., and J. Ryan Frazee, Esq., Wiley Rein LLP, for the protester. Mary G. Courtney, Esq., and Annemarie Drazenovich, Esq., Department of Veterans Affairs, for the agency. Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest that agency failed to engage in adequate discussions with protester is dismissed where the protest was not timely filed in accordance with our Bid Protest Regulations.

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## DECISION

ThunderCat Technology, LLC, of Reston, Virginia, protests the elimination of its quotation from further consideration under request for quotations (RFQ) No. 36C10B22Q0377, issued by the Department of Veterans Affairs (VA) for “provisioning-as-a-service” activities to support delivery of VA endpoint devices to various VA locations.<sup>1</sup> ThunderCat argues that the agency erred in failing to engage in adequate discussions with it prior to the elimination of its quotation.

We dismiss the protest as untimely.

## BACKGROUND

The facts of this case are straightforward and not in dispute. The RFQ contemplates the issuance, on a best-value tradeoff basis, of a task order to provide the solicited services for a 1-year base period and four 1-year option periods. Firms were advised that quotations would be evaluated considering price and three non-price factors:

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<sup>1</sup> These activities include project/account management, reporting, continuity of operations planning, receiving endpoint devices, storage, asset tagging, kitting, imaging services, and shipping of endpoint devices.

compliance specification spreadsheet, written proposal, and past performance. RFQ at 120. The compliance specification spreadsheet factor was to be evaluated on a pass/fail basis, *id.*, and is the only factor at issue in this protest.

The RFQ required firms to submit a compliance specification spreadsheet. RFQ, attach. D, Compliance Specification Spreadsheet. The spreadsheet required firms to affirmatively represent whether they were offering products that conformed to the technical requirements detailed in each row of the spreadsheet, and also required firms to provide proof of conformance in the form of original equipment manufacturer (OEM) specification sheets or other appropriate proof (such as required industry certifications) demonstrating that the offered products met the RFQ's specifications.

The record shows that the agency received a number of quotations in response to the RFQ and, after evaluation, determined that none of the quotations met all of the requirements of the specification compliance spreadsheet. Specifically, none of the quotations included adequate proof (such as OEM specifications sheets) for the agency to determine the acceptability of the offered products.

The agency then engaged in several rounds of what it describes as exchanges with all firms submitting quotations. During those exchanges, the agency identified those instances where the agency could not determine the acceptability of the quoted items, and firms were permitted to provide the agency with additional proof (such as OEM specification sheets) in an effort to demonstrate the compliance of each item with the RFQ's specifications. In addition, firms also were afforded an opportunity to revise their prices.

At the conclusion of these exchanges, the agency eliminated ThunderCat's quotation from further consideration. The record shows that, as to one of the components included with ThunderCat's quotation (a video adaptor), the protester repeatedly sought to substitute a different component for the one originally identified in its initial quotation. The agency repeatedly refused to allow ThunderCat to substitute the different component, advising that the only changes that could be made to its quotation were either to the supporting documentation for the components originally included in its quotation, or to its price. After being advised of the elimination of its quotation from consideration and requesting and receiving a debriefing, ThunderCat filed the instant protest.<sup>2</sup>

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<sup>2</sup> The competition was confined to service-disabled veteran-owned small business firms holding indefinite-delivery, indefinite-quantity contracts under the National Aeronautics and Space Administration Solutions for Enterprise-Wide Procurement V Government-Wide Acquisition contract program. The value of the protested task order--estimated at approximately \$410 million--exceeds \$10 million. Accordingly, this protest is within our jurisdiction to consider challenges to task orders placed under civilian agency multiple award contracts. 41 U.S.C. § 4106(f)(B)(2).

## DISCUSSION

ThunderCat argues that the agency engaged in discussions but failed to engage in adequate discussions. Specifically, ThunderCat argues that the agency improperly limited discussion responses to revisions to the proof required to demonstrate compliance with the RFQ's specifications, and changes to price, but improperly declined to allow any other changes to be made to the quotations, such as changes to the components included in the initial quotations. ThunderCat argues that this was legally impermissible.

We dismiss the protest as untimely.

The record shows that on September 20, 2022, the agency advised all of the vendors of its intention to limit the scope of quotation revisions. All firms were advised in identical language that, while they could submit additional information to demonstrate the compliance of their products with the requirements of the RFQ, and could make revisions to their prices, they would not be permitted to make changes to the products included in their initial quotations (all firms also were advised that responses were due by September 21). Specifically, each firm was provided with two identical e-mails from the contracting officer. The first of these e-mails provided as follows:

Good Afternoon,

In addition to the responses to the exchanges, Offerors are advised that if any responses affect your Price volume, you may also submit a revised VOLUME IV- PRICE/COST FACTOR.

Thank you,

See, Agency Report (AR), Exh. 8, Exchanges with ThunderCat, at 7; see also e.g. AR, Exh. 9a, Exchanges with Vendor A, at 5.

The second of these e-mails provided as follows:

Good Afternoon,

To follow up, the responses to exchanges shall be responsive with respect to the initial "Proposed Device Make, Model and Part Number (Column F)" in Attachment D, Compliance Specification Spreadsheet–Accessory Specifications Tab. Accordingly, no changes are to be made to the products initially proposed.

Thank you,

AR, Exh. 8, Exchanges with ThunderCat, at 6; see also e.g. AR, Exh. 9a, Exchanges with Vendor A, at 4. Thus, all firms were clearly advised of the agency's intention to limit the changes that could be made to their quotations, and all firms were clearly

advised of the agency's position regarding the possibility of substituting different components for those included in their respective initial quotations.

The record shows that, after being advised of the agency's limitation, the protester took the position that the agency was legally required to afford the firm an opportunity to make revisions to the components it had initially included in its quotation. In this connection, and in apparent direct response to the agency's refusal to allow changes to the components included in its initial quotation, ThunderCat stated:

As part of these discussion[s] and in accordance with FAR [Federal Acquisition Regulation] 15.306 "Exchanges with offerors after receipt of proposals" we would like to make a part number correction. This will not impact our price. Part [deleted] was intended to be Part [deleted]. We have provided documentation confirming it meets the resolution specifications and supports up to 4K HD (3840 x 2160) @ 30Hz (Attachment "[deleted] Specifications).

AR, Exh. 8, Exchanges with ThunderCat, at 2 (ThunderCat Revised Compliance Specification Spreadsheet, at cell 29H). ThunderCat included with its revised quotation an OEM specification sheet for the part it wanted to substitute.

In response to this statement, the agency advised ThunderCat for a second time, in a September 29 letter calling for the submission of its revised quotation, of the permissible changes it could make to its quotation:

The Government would like to clarify its previous guidance for these Exchanges. You were advised to respond to the issue listed in Column G for the Video Adapter (HDMI-F) to (DP-M) for Part Number [deleted] ONLY, the same Part Number as was included in your original proposal. You were further advised that the Government will not allow changes to the initially proposed products. You are reminded that the responses to these Exchanges shall be with respect to the initial "Proposed Device Make, Model and Part Number (Column F)" in Attachment D, Compliance Specification Spreadsheet—Accessory Specifications Tab. Accordingly, **no changes are to be made to the products initially proposed.** The Government requests you revert your proposal back to those products initially proposed, specifically Part Number [deleted], and reply to the questions initially sent in Round 1, with respect to the original Part Number, and not the revised part included in your response to Round 1 Exchanges.

AR, Exh. 10, Round 2 Exchanges with ThunderCat, at 1. In response to these direct instructions from the agency, ThunderCat revised its quotation to include the part that it originally had included in its initial quotation. *Id.* at 2, (ThunderCat Second Revised Compliance Specification Spreadsheet, at cell 29H). Based on the fact that this component did not meet the requirements of the RFQ, the agency rejected ThunderCat's quotation.

The timeliness rules in our Bid Protest Regulations reflect the dual requirements of providing parties with a fair opportunity to present their cases, and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *CSRA, LLC*, B-417635, *et al.*, Sept. 11, 2019, 2019 CPD ¶ 341 at 6-8. Where, as here, an agency limits the scope of discussions in a manner that the protester believes is legally objectionable, the protester may not wait until its proposal or quotation is eliminated from further consideration to file its protest, and must instead file its protest before the deadline for proposal revisions. *See Id.*

We find ThunderCat's protest untimely. As noted, ThunderCat and all of the other vendors were advised on September 20 of the limitation being imposed by the agency in connection with the initial round of exchanges. In response to that limitation, ThunderCat made clear its view that it thought the agency was improperly limiting the revisions that could be made to its quotation, and that it thought it should be permitted to make a revision to its quotation that included changing one of the products it had included in its quotation. The record therefore shows that ThunderCat understood the limitations regarding quotation revisions as of its receipt of the agency's two September 20<sup>th</sup> e-mails establishing the limitation.<sup>3</sup>

In light of these circumstances, we conclude that ThunderCat was required to file its protest no later than September 21, the deadline for submitting revised quotation. 4 C.F.R. § 21.2(a)(1); *CSRA, LLC supra*. ThunderCat's protest, filed on November 28, was therefore untimely.

ThunderCat requests that, in the event we find its protest untimely, we consider invoking either the "good cause" or "significant issue" exceptions to our timeliness rules. We decline to do so.

With respect to the first exception, our timeliness rules provide that our Office may consider an otherwise untimely protest where the protester has shown that there is a "good cause" for the untimely submission of its protest. 4 C.F.R. § 21.2(c). ThunderCat essentially argues that the agency's actions here so brazenly violate the well-

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<sup>3</sup> By providing all firms with identical information during the course of its exchanges, the agency effectively amended the terms of the RFQ (and by extension, the ground rules of the competition), thereby limiting the scope of the changes that could be made to their respective quotations. *Sikorsky Aircraft Corporation*, B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 7, n. 8 (where, as here, the agency has issued a clarification letter to all offerors during discussions, coupled with an opportunity to revise their proposals accordingly, we view that clarification as tantamount to a solicitation amendment); *see also PWC Logistics Services, Inc.*, B-299820, B-299820.3, Aug. 14, 2007, 2007 CPD ¶ 162 at 5-6, n 3 (where, as here, an agency provides identical language or information to all offerors during discussions, its actions are tantamount to amending the RFP, even though no formal amendment has been independently issued.)

established rules for the conduct of discussions that this provides the “good cause” for invoking this exception to our timeliness rules.

Invocation of the good cause exception to our timelines rules requires a showing on the part of the protester that there was some “good cause” that prevented it from filing its protest in a timely manner. For example, we recently invoked the good cause exception to our timeliness rules to consider an untimely protest challenging, among other things, the terms of the solicitation filed after the deadline when proposals were due. The reason we considered the protest was because of the creation (on June 17), and subsequent immediate celebration (on June 18), of the Juneteenth National Independence Day holiday, which effectively precluded the protester from filing its protest in a timely manner because our Office was closed at the time proposals were due. *Bland & Associates. PC*, B-419924, Sept. 28, 2021, 2021 CPD ¶ 332.

Here, the protester essentially misstates the underlying policy of the good cause exception to our timeliness rules. We do not invoke the exception where there is some “good” or “compelling” legal basis for our Office to consider an otherwise untimely protest. Rather, we confine our use of the exception to those instances where there is some “good cause”—such as an unexpected and unanticipated new federal holiday—that prevents the protester from timely filing with our Office. Since there is no such good cause here, we decline to invoke that exception to our timeliness rules.

As to the significant issue exception, the protester argues that this case presents a significant issue because it involves a question relating to the propriety of discussions in an acquisition conducted pursuant to FAR part 16, rather than FAR part 15.

Our Office uses the significant issue exception to our timeliness rules sparingly to consider protests that present issues of widespread interest to the procurement community that have not previously been considered by our Office. *Celadon :Laboratories, Inc.*, B-298533, Nov. 1, 2006, 2006 CPD ¶ 158. No such issue is presented here. In fact, the protester concedes as much, stating: “Although ThunderCat believes that GAO precedent is quite clear as to when FAR Part 16 exchanges become discussions, a public refresher is evidently needed.” ThunderCat Supplemental Brief, Feb. 13, 2023, at 4. It is therefore evident that not even the protester believes this case presents a question of widespread significance to procurement the community that has not previously been considered by our Office. We therefore decline to invoke that exception to our timeliness rules here.

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel